

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LENNIE GERALD JACKSON,

Defendant-Appellant.

---

UNPUBLISHED

May 10, 2011

No. 296481

Wayne Circuit Court

LC No. 09-007034-FH

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree home invasion, MCL 750.110a(4), and two counts of domestic violence, MCL 750.81(2). The jury was unable to reach a verdict with respect to one count of aggravated stalking, MCL 750.411i, and two counts of felonious assault, MCL 750.82, and the trial court declared a mistrial with respect to those counts. Defendant was sentenced to ten months in jail for the home invasion conviction and 93 days in jail for the domestic violence conviction, to be served concurrently. He appeals as of right. We affirm.

Defendant was charged with a series of offenses during the period of January 3, 2009, to February 16, 2009. The complainant testified that on the latter date, she found defendant in her home. He left, but then returned and began removing a meter from the house. The complainant claimed that when she questioned him, he began “stomping” her and hit her with a board. Defendant admitted that he was served with a valid personal protection order (“PPO”) on January 29, 2009, and continued contacting the complainant. He denied striking the complainant.

Defendant first argues that the trial court erred when it responded to a jury request for information clarifying the dates of some of the events that prevented review of the testimony contrary to MCR 6.414(H).<sup>1</sup> We disagree. The trial court informed the attorneys that it planned to advise the jury that it would have to determine the dates from the evidence presented at trial. Defense counsel stated that he had no objection to proceeding in that manner. Later, when

---

<sup>1</sup> The provision cited by defendant is now MCR 6.414(J).

addressing a juror's question regarding the schedule for deliberations, defense counsel sua sponte asserted that the jury should be given transcripts. Because defense counsel affirmatively approved the trial court's response, defendant may not now argue on appeal that the court's handling of the matter was in error. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Any error has been waived. Contrary to what defendant argues, defense counsel's later request that the court provide the jury with a transcript or testimony to address the jury's question did not preserve the issue because the request was not made until after the jury had resumed deliberations and, therefore, was untimely. MCR 2.516(C).

Defendant next argues that he is entitled to a new trial because trial counsel's deficient performance deprived him of the effective assistance of counsel. Because defendant did not raise his ineffective assistance of counsel claims in a motion for a new trial or request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to errors apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citations omitted).

Defendant first argues that trial counsel was ineffective for eliciting on direct examination that he (defendant) had never been convicted of assaulting the complainant or anyone else. Defendant argues that the questions "opened the door" for the prosecutor to question defendant about a prior conviction for breaking a window on the complainant's vehicle, which defendant contends showed his propensity for violence and aggression. Defendant's argument is premised on a causal connection between defense counsel's solicitation of favorable testimony (that defendant had never been convicted of assaulting anyone) and the subsequent admission of defendant's malicious destruction of property conviction upon questioning by the prosecution. However, the record does not establish that the latter was deemed admissible only because of the introduction of the former.

Initially, we note that the trial court's reasons for allowing the malicious destruction of property conviction are not apparent from the record because the matter was discussed during bench conferences off the record. Further, the property conviction appears to have been relevant to the aggravated stalking charge.<sup>2</sup> In addition, the trial court may have allowed the property conviction evidence pursuant to MCL 768.27b, which "permits evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act." *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010).

---

<sup>2</sup> Stalking is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e).

Furthermore, it is not apparent from the record that defense counsel should have anticipated that defendant's testimony that he had never been convicted of assaulting anyone would influence the admissibility of the evidence concerning the broken car window. Alternatively, counsel may have deliberately taken a strategic risk that the court would not admit the window-breaking evidence in spite of defendant's testimony, or defense counsel may have reasonably believed that if the court did allow inquiry into the window-breaking incident, it would also allow testimony about the circumstances of the incident that would nullify any negative inference. The issue raised by defendant is not whether the window-breaking evidence was admissible, but whether defense counsel was ineffective for eliciting favorable testimony from defendant that he had never been convicted of assaulting anyone.

In sum, the record does not establish that the admissibility of the window-breaking evidence was influenced by defendant's prior testimony that he had never been convicted of assaulting anyone, and further, defendant has not overcome the presumption that defense counsel elicited the latter evidence as a matter of sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Therefore, this first claim of ineffective assistance of counsel cannot succeed.

Defendant next challenges trial counsel's decision to have Officer Rios testify about the complainant's account as recorded in his police report. Defendant contends that there was no reasonable strategy to allowing this otherwise inadmissible testimony because it reinforced the complainant's testimony and did not produce any significant inconsistencies to impeach her. We disagree. Defense counsel's strategy emphasized the inconsistency between the complainant's account that defendant severely beat her with a board and the lack of any objective evidence to substantiate her claimed injuries. Defendant contends that trial counsel should have only asked Officer Rios about his observation of the complainant's physical condition. But having Officer Rios read the complainant's version in the report had some benefits. Counsel was able to emphasize that the complainant had reported being hit several times in the face, which was suspect in light of Officer Rios's testimony that he did not observe any injuries to her mouth and face. Indeed, it appears that counsel's strategy was largely successful because the jury deadlocked on the two felonious assault charges that were based on defendant's alleged attack of the complainant with the board. Defendant has not overcome the presumption that defense counsel's questioning of Officer Rios was sound trial strategy under the circumstances. *Toma*, 462 Mich at 302.

Defendant lastly contends that defense counsel was ineffective for failing to investigate or produce witnesses. He argues that, with a "minimal investigation," trial counsel could have determined whether the complainant called 911 and also determined the identities of any other police officers who were dispatched to the scene. However, defendant has not offered any evidence to show whether a 911 call concerning the incident was actually made or how it could have helped his case. Further, he has not identified any police witnesses who he believes should have been called to testify, or any evidence of what their testimony would have been. Defendant cannot base a claim of ineffective assistance of counsel on a failure to produce evidence that defendant has not shown actually exists. In short, defendant has failed to establish the necessary factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Although defendant also requests that this Court remand this case for an evidentiary hearing, he did not file a motion to remand in this Court and his request is not accompanied by an affidavit or offer of proof demonstrating factual support for his claims. See MCR 7.211(C)(1)(a). Accordingly, a remand is not warranted.

Next, defendant challenges the circuit court's jurisdiction with respect to the third-degree home invasion charge because it was premised on a personal protection order, which defendant contends is a matter within the sole and exclusive jurisdiction of the family division of circuit court.

This Court reviews de novo questions of subject-matter jurisdiction. *People v Clement*, 254 Mich App 387, 389-390; 657 NW2d 172 (2002). A person commits third-degree home invasion if he enters a dwelling without permission and at any time while entering, present in, or exiting, violates a personal protection order term or condition that was ordered to protect a named person. MCL 750.110a(4)(b)(iii). Defendant relies on MCL 600.1021(1)(k), which states:

*Except as otherwise provided by law*, the family division of circuit court has sole and exclusive jurisdiction over the following cases commenced on or after January 1, 1998:

\* \* \*

(k) Cases involving personal protection orders and foreign protection orders under sections 2950 to 2950m. [Emphasis added.]

Defendant's argument that "[o]nly the Circuit Court Judge in Family Division could determine whether a violation occurred" ignores the proviso, "Except as otherwise provided by law. . . ." The circuit court's jurisdiction over criminal matters is "provided by law." See MCL 767.1. Accordingly, there is no merit to defendant's jurisdictional challenge.

Finally, defendant argues that the jury's verdict was against the great weight of the evidence because the complainant's testimony was not credible, and thus the trial court abused its discretion in denying his motion for a new trial. This Court reviews the trial court's decision for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

"New trial motions based solely on the weight of the evidence regarding witness credibility are not favored." *Id.* at 639. Absent exceptional circumstances, the issue of credibility should be left for the trier of fact. *Id.* at 642. Even where "testimony is in direct conflict and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury." *Id.* at 643 (citation and internal quotations omitted). Exceptional circumstances that may justify a new trial include testimony that "contradicts indisputable physical facts or laws, where testimony is patently incredible or defies physical realities, where a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror, or where the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id.* at 643-644 (citations and internal quotations omitted).

This case presented the jury with a credibility contest between the complainant and defendant. The jury had the opportunity to observe the witnesses and their demeanor to evaluate their credibility. *Id.* at 646. “The question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, despite any misgivings or inclinations to disagree, to leave the test of credibility where statute, case law, common law, and the constitution repose it in the trier of fact.” *Id.* at 646-647 (internal quotation marks omitted). The trial court did not abuse its discretion in denying defendant’s motion for a new trial.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood